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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-1505

United States Court of Appeals
For the Sixth Circuit No. 78-5152

ANTHONY D. GIACALONE,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ANTHONY D. GIACALONE,
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vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Anthony D. Giacalone, by his attorneys, Ivan E. Barris and David F. DuMouchel, prays that a Writ of Certiorari issue to review the Judgment heretofore entered against him by the United States Court of Appeals for the Sixth Circuit on November 6, 1978, and the denial of the Petition for Rehearing *En Banc* entered on February 7, 1979.

OPINIONS BELOW

The judgment and commitment of the United States District Court for the Eastern District of Michigan, Southern Division, is unreported, but is set forth in Appendix A herein.

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 587 F2d 5 (CA 6, 1978), and is set forth as Appendix B herein.

The Order of the United States Court of Appeals for the Sixth Circuit denying the Petition for Rehearing *En Banc* is unreported, but is set forth in Appendix C.

The Honorable Potter Stewart, Circuit Justice for the Sixth Circuit, on February 16, 1979 entered an Order Extending Time To File Petition For Writ of Certiorari to April 7, 1979, set forth herein as Appendix F.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 6, 1978; Petition For Rehearing *En Banc* was filed on November 15, 1978, and was Denied on February 7, 1979. The Honorable Potter Stewart, Circuit Justice for the Sixth Circuit, on February 16, 1979 entered an Order Extending Time to File Petition For Writ of Certiorari to April 7, 1979, set forth herein as Appendix F. The jurisdiction of the Court is invoked under Title 28, U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

I

Whether, in a federal perjury or false declarations prosecution, 18 U.S.C. §§1621, 1623, the Due Process clause of the Fifth Amendment to the United States Constitution requires that the necessary element of materiality of the statements be proven beyond a reasonable doubt?

STATUTES INVOLVED

18 U.S.C. §§1621, 1623 (Perjury; False Statements). (Appendix D, E., *infra*).

SUMMARY OF THE CASE

Petitioner Anthony D. Giacalone was indicted on April 13, 1977 on four Counts. Counts I, II, III were for making false declarations, contrary to 18 USC §1623. Count IV was for perjury contrary to 18 USC §1621. At trial before the Honorable James P. Churchill, in the Eastern District of Michigan, Mr. Giacalone was jury-convicted of each Count on November 18, 1977. Motion for Judgment of Acquittal or in the Alternative for a New Trial was denied on December 8, 1977. On January 11, 1978, judgment was entered, and Mr. Giacalone was sentenced to a term of eighteen (18) months imprisonment on each Count, such terms to run concurrently, and a fine of Two Thousand Five Hundred ($2,500.00) Dollars on each Count, totaling Ten Thousand ($10,000.00) Dollars. The United States Court of Appeals for the Sixth Circuit affirmed the conviction on November 6, 1978, and Petition for Rehearing *En Banc* was denied February 7, 1979. Extension for filing Petition for Writ of Certiorari was granted until April 7, 1979.

STATEMENT OF THE CASE

These charges against Petitioner Anthony D. Giacalone arose out of an investigation and subsequent trial of his father, Anthony J. Giacalone, who was convicted of tax evasion for the years 1968 - 1971.

During the investigation of Anthony J. Giacalone, Petitioner herein, Anthony D. Giacalone appeared before the Special Federal Grand Jury for the Eastern District of Michigan on March 27 and April 2, 1975. The three Counts in the Indictment alleging false material declarations, 18 USC §1623, arose out of statements made during this Grand Jury appearance. These statements allegedly were so inconsistent with Petitioner's testimony at the subsequent trial of his father one year later, that one of the declarations was alleged to have been knowingly and necessarily false.

Petitioner was married on February 4, 1970. A large reception followed at the Latin Quarter, at which numerous gifts were received, almost exclusively consisting of envelopes containing cash. Petitioner testified at his father's trial that he was informed the following day by telephone that the total cash wedding gifts amounted to One Hundred Four Thousand ($104,000.00) Dollars, and that various wedding reception expenses amounted to Ten Thousand Four Hundred and Eight and 64/100 ($10,408.64) Dollars, which amount was paid from the wedding proceeds by his father. He further testified that an additional Twenty Five Thousand ($25,000.00) Dollars was taken from the wedding proceeds and invested in Giacalone Homes. Subtracting these two sums from the total cash wedding gifts resulted in a net cash gift of Sixty Three Thousand Five Hundred Forty Nine and 83/100 ($63,549.83) Dollars. Petitioner testified at his father's

trial that this amount was "rounded off to $65,000.00" by his parents, and that his father delivered the Sixty Five Thousand ($65,000.00) Dollars in cash to him which he took on his honeymoon in Florida.

At the April 2, 1975 grand jury appearance, Petitioner was asked whether he was of the impression at that time that the Twenty Five Thousand ($25,000.00) Dollars was the sum total of the wedding gifts that he and his wife received. He responded affirmatively.

During the same proceeding, Petitioner was asked whether he recalled if he ever had more than Twenty-Five Thousand ($25,000.00) Dollars personally on hand. He responded that he did not recall if he ever "had that much on me outside of the Twenty-Five that I have in the Company, myself, personally, I didn't."

Finally, during the same grand jury proceeding, the following colloquy occurred:

> "Q: Speaking of that, the Grand Jury would like to clarify a couple of things regarding that transaction and the source of that money that I am talking about, the Twenty-Five Thousand Dollars you indicated was invested in Euro Homes***
>
> A: Giacalone Homes, it was.
> * * *
>
> Q: Was there any money left over from the wedding gifts that you and your wife received, that is, money that was in excess of the Twenty-Five Thousand Dollars that you testified was expended to acquire the interest in the corporation?
>
> A: I don't recall if there was any more, sir.
> * * *

Q: If there was any money left over, where would it have gone or where would it have been placed?

A: I have no idea."

Count IV of the Indictment — the Perjury Count — does not relate to Grand Jury testimony, but rather to Petitioner's testimony at his father's trial concerning Anthony J. Giacalone's giving Petitioner approximately Eight Thousand ($8,000.00) Dollars cash at home, and Petitioner's purchasing a cashier's check in the amount of Eight Thousand Three Hundred Twenty-Four ($8,324.00) Dollars on October 28, 1969 with which he paid for a new automobile which he picked up for his father at the dealership. The Indictment alleged that this testimony was knowingly false because on that day, Anthony J. Giacalone was an in-patient in Grace Hospital and did not give Petitioner any money.

Upon completion of the government's proofs at trial, defense counsel moved for Judgment of Acquittal on each Count. (TR 435-468) As to Counts I, II, III, the argument was put forth that the statements made were as a matter of law and logic not necessarily inconsistent such as to allow finding Defendant guilty of violating 18 USC 1623. (TR 436-440) As to Count IV, the argument was put forth that the testimony of Petitioner concerning the obtaining of money from his father to purchase an automobile was not material to an issue in dispute at the trial of his father. (TR 440-444). Further, the argument was made that the element of materiality would have to be proven beyond a reasonable doubt in order to convict on any of the Counts. (TR 442-444). The Court denied the Motion on each Count, but specifically did not find materiality beyond a reasonable doubt at this time. (TR 468).

Petitioner did not testify. At the close of all the evidence defense counsel again moved for Judgment of Acquittal. After adopting by reference the arguments made at the close of the Government's case, argument was addressed to the question of materiality, specifically (1) the rule requiring that element to be determined by the Court and not the jury, and (2) the burden of proof required for determination of guilt on that element. (TR 688-690).

The Court ruled that the element of materiality was a question of law for the Court and that he was not required to find materiality beyond a reasonable doubt, and specifically declined to do so, but ruled that the issue of the credibility of the testifying witness made the testimony material. (TR 695-697a).

The Court instructed the jury that if they found that the Petitioner testified before the Grand Jury and the trial court as charged, this testimony was material as a matter of law. (TR 716, 721).

Timely objection to this instruction was made by defense counsel. (TR 732)

The jury found Petitioner guilty on each Count.

A Motion for Judgment of Acquittal and/or New Trial was denied on December 8, 1977.

On January 11, 1978, judgment was entered and Defendant was sentenced to a concurrent term of eighteen (18) months imprisonment on each Count, and a fine of Two Thousand Five Hundred ($2,500.00) Dollars on each Count, totaling Ten Thousand ($10,000.00) Dollars.

On November 16, 1978 the United States Court of Appeals for the Sixth Circuit affirmed the conviction on

each Count, holding that the "question" of materiality of the declarations in a perjury or false statement prosecution is one of law, and not of fact, and therefore the Government need not prove materiality beyond a reasonable doubt.

Petition For Rehearing *En Banc* was denied by Order of February 7, 1979.

The Honorable Potter Stewart, Circuit Justice for the Sixth Circuit, on February 16, 1979 entered an Order Extending Time To File Petition For Writ of Certiorari to April 7, 1979, set forth herein as Appendix F.

REASONS FOR ALLOWANCE OF THE WRIT

I.

THE COURT OF APPEALS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH HAS NOT BEEN DIRECTLY CONSIDERED OR SETTLED PREVIOUSLY BY THIS COURT, TO-WIT THE STANDARD OF PROOF TO BE APPLIED IN DETERMINING THE EXISTENCE OF THE ELEMENT OF MATERIALITY IN A FEDERAL PERJURY OR FALSE DECLARATION PROSECUTION.

Despite the number or reported cases concerning perjury or false declarations, only one other case has been located which directly mentions the precise narrow question of the standard of proof required to prove the element of materiality, and that opinion states that in a prosecution under 18 USC §1623, the Government "still retains the burden of proving *** materiality *** beyond a reasonable doubt." *United States v. Stassi*, 443 F Supp 661, 666 (D.N.J., 1977).

Petitioner in the instant case agrees, and urges that inasmuch as "materiality" of the statements is unquestionably an essential "element" of the crime of perjury, 18 USC §1621, *United States v. Debrow*, 346 US 374; 74 S Ct 113 (1953), and false declarations, 18 USC §1623, *United States v. Koonce*, 485 F2d 374, 381 (CA 8, 1973), and inasmuch as the Due Process clause "requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the Defendant is charged," *Patterson v. New York*, 432 US 197; 97 S Ct 2319, 2327; 52 L Ed 2d (1977), the opinion of the United States Court of Appeals for the Sixth Circuit in the instant case holding that the element of materiality need not be proven beyond a reasonable doubt in order to convict states an erroneous rule of law.

More importantly, as this is an issue of crucial Constitutional importance far beyond the immediate case, this opinion should not be allowed to stand unreviewed for its clear conflict with the rationale of recent opinions of this Honorable Court. *E.g., In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970), *Mullaney v. Wilbur*, 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975).

For years, this issue has been ripe for resolution, due to the seemingly inherent contradiction between calling materiality an "element of the crime of perjury," and yet denominating this "element" a question of law for the court to decide at trial. E.g., *Sinclair v. United States*, 279 US 263; 49 S Ct 268 (1929).

While allowing the court to determine the existence of an element of crime necessarily deprives the defendant of his Constitutional right to a trial by jury, that "rule,"

which is unique to the crime of perjury, (and false declarations) becomes even more pernicious when it serves as the basis for lowering the standard of proof of the element of materiality.

Denominating "materiality" a question of law for the court to decide does not change its character as a necessary element of the crime. *United States v. Debrow*, 346 US 374; 74 S Ct 113 (1953). At the very least, if the rule is to continue that the trial court may usurp the jury's function as the trier of fact on the existence of this necessary element of a crime, it should certainly be held to the standard of proof required of the trier of fact in every criminal case — proof beyond a reasonable doubt. *In re Winship, supra*.

The Court of Appeals in the instant case continued the confusion between the "test" of materiality — which has been decided numerous times, and the *standard of proof* by which to determine whether that test is met — which has not been addressed directly in prior cases, either by the Courts of Appeals or this Honorable Court.

The closest reported case reaching a Court of Appeals discovered by counsel for Petitioner concerning this narrow question is *United States v. Lasater*, 403 F Supp 208, 217 (W.D. Mo, 1975) aff'd, 535 F2d 1041 (CA 8, 1976):

> "Both parties have agreed that *United States v. Koonce, supra*, states the applicable rules of law. The conviction in *Koonce* was reversed because 'the government failed to prove the materiality of the statements in question.' Id. at 381. *Koonce* concluded that the evidence of materiality the government adduced in that case fell 'far short of the ' "clear, convincing, and direct evidence' " required by *Brown v. United States*, 245 F2d 549, 556 (8th Cir. 1957) to sustain a conviction.' Id. [Emphasis ours] We need not reach the contested question of the appropriate standard of proof, 'clear, convincing and direct evidence,' or proof beyond a reasonable doubt. For we expressly state that we cannot find, even under a preponderance of the evidence standard, that the evidence adduced by the government establishes that, to use the language of *Koonce*, 'the statements had the tendency to influence, mislead, or hamper the grand jury's investigation.' "

In language particularly apropos of the case at bar, the Court in *Lasater* recognized:

> "A failure to meet the preponderance of the evidence standard obviously carries with it our finding and conclusion that the government did not meet either the 'clear, convincing, and direct evidence standard' of *Brown*, or the usual criminal standard of proof beyond reasonable doubt." 403 F Supp 217 fn. 7.

The matter, accordingly, remains unsettled by the Courts of Appeal.

In the recent case of *United States v. Stassi*, 443 F Supp 661 (D.N.J., 1977), the United States District Court stated:

> "Despite the modifications and simplifications resulting from the adoption of 18 U.S.C. §1623, the government still retains the burden of proving knowledge, falsity and materiality of the statement or statements in question beyond a reasonable doubt." 443 F Supp at 666.

The legislative history of 18 U.S.C. §1623, as well as the plain language of (e) of §1623 also indicate the correctness of Petitioner's position. 18 U.S.C. §1623 (e) provides: *Proof beyond a reasonable doubt* under this section is sufficient for conviction." (emphasis added). Admittedly, this section is specifically directed at the elimination of the "two-witness" rule in perjury cases, but it clearly states the minimum standard of proof for conviction, recognizing it to be that required for each element of every crime.

The legislative history of §1623 makes the point even more directly:

> "Knowledge, falsity, and materiality are distinct elements of the offense which must be proved whether a prosecution under this section is based upon a single false statement or upon logically inconsistent statements.
>
> * * *
>
> Section 1623 (e) makes proof beyond a reasonable doubt under this section sufficient for conviction. It is specified that proof need not be made by a particular number of witnesses or by documentary or other particular type of evidence. *This provision permits proof of the false declaration offense to be made by the same beyond a reasonable doubt standard required for conviction in prosecutions for all other criminal offenses.*" 1970 Code Cong. & Admin. News. 4023-4024 (emphasis added).

Finally, although Petitioner contends that the Government is required to prove the element of

materiality in a perjury case beyond a reasonable doubt, as with every other element of a crime, it is respectfully submitted that the more critical matter is that this Honorable Court consider and decide this narrow but critically important Constitutional issue.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges that the Petition for the Writ of Certiorari be granted, or, in the alternative, that the Opinion and Order of the United States Court of Appeals for the Sixth Circuit affirming Petitioner's conviction be summarily reversed.

Respectfully submitted,

IVAN E. BARRIS
DAVID F. DuMOUCHEL

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Dated March 27, 1979

APPENDIX A

JUDGMENT AND COMMITMENT OF TRIAL COURT

(United States District Court — Eastern District of Michigan, Southern Division)

(Filed January 11, 1978)

Defendant: Anthony D. Giacalone
Docket No: 77-80502

In the presence of the attorney for the government the defendant appeared in person on this date: 1/6/78.

Counsel: With Counsel Ivan E. Barris

Finding & Judgment:

There being a finding/verdict of GUILTY OF FOUR COUNT INDICTMENT Defendant has been convicted as charged of the offense(s) of Perjury, Title 18:1621 and Perjury — false declarations before grand jury, Title 18:1623.

Sentence or Probation Order:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 18 months on each of the four counts.

IT IS FURTHER ADJUDGED that said sentence run concurrent on each of the four counts.

IT IS FURTHER ADJUDGED that the defendant will be fined $2,500 on each of the four counts. (total of $10,000.00). The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.

Special Conditions of Probation:

The defendants personal bond is hereby continued pending appeal.

Additional Conditions of Probation:

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of the judgment and commitment to the U.S. Marshall or other qualified officer.

/s/ HON. JAMES P. CHURCHILL

Date: 1/11/78

APPENDIX B

COURT OF APPEALS OPINION

No. 78-5152
(United States Court of Appeals
For the Sixth Circuit)

587 F2d 5 (CA6, 1978)

(United States of America, *Plaintiff-Appellee*, v. Anthony D. Giacalone, *Defendant-Appellant.*)

Decided and Filed November 6, 1978

Before: CELEBREZZE and MERRITT, Circuit Judges; PECK, Senior Circuit Judge.

MERRITT, Circuit Judge. Following a jury trial, the defendant, Giacalone, was convicted of three counts of making false declarations, in violation of 18 U.S.C §1623, before a grand jury pursuing a tax evasion investigation of his father, and one count of perjury in violation of 18 U.S.C. § 1621, at his father's trial. He was sentenced by Judge Churchill to concurrent terms of eighteen months' imprisonment and fined $2,500.00 on each of the four counts.

The evidence shows that the defendant appeared before a grand jury investigating the federal income tax liability of his father where he testified that he had received a total of $25,000.00 in cash as wedding gifts which was invested in Giacalone Homes. He stated before the grand jury that he did not recall any other money being left over from the wedding gifts received. Approximately one year later, the defendant appeared as a witness in his father's trial for tax evasion. At the

trial it was in his father's interest for the defendant to testify that he received more than $25,000.00 in wedding gifts, and he testified that he received $104,000.00 in wedding gifts. Contradictions between defendant's trial and grand jury testimony concerning the amount and disposition of these gifts was the basis of Counts I, II and III of the indictment.

Count IV was a perjury count. The defendant testified at his father's trial that on a certain date his father gave him $8,324.00. The government introduced evidence that defendant's father did not give him any such amount on that date.

The defendant appeals on three grounds: First, the District Court erred by holding that the materiality of the defendant's testimony at the grand jury hearing and at the trial — materiality being an element of the offense charged — is a question of law for the court rather than a question of fact for the jury. Secondly, the defendant claims that the court erred in ruling that the government does not have to prove the materiality of the false statements beyond a reasonable doubt, even if materiality is a question of law rather than a question of fact for the jury. Thirdly, the defendant claims that the grand jury testimony for which he was indicted in the first three counts of the indictment does not contradict and is not inconsistent with his trial testimony.

It has long been settled that the question of materiality in a perjury or false statement case is one of law for the courts to decide. *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929); *United States* v. *Beitling*, 545 F.2d 1106, 1109 (8th Cir. 1976), *cert. denied*, 430 U.S. 918 (1977). Since the issue of materiality is a legal question, not a question of fact, the government need not prove materiality beyond a reasonable doubt, and Judge Churchill was not bound to apply the traditional standard of proof for questions of fact. Therefore, the defendant's first two claims on appeal are without merit.

With respect to the defendant's third claim, the evidence supports the jury's verdict that defendant's statements at the grand jury and at the trial were inconsistent. He testified at the grand jury that he received not more than $25,000.00 in wedding gifts. At the trial, he testified that he received $104,000.00. While the question for which defendant was indicted in Count I has a subjective element in it, his answer is literally inconsistent with his testimony at the trial. Viewing the evidence most favorably to the government, as we must do, *Glasser* v. *United States*, 315 U.S. 60, 80 (1941), the evidence supports the jury's verdict of guilty.

Accordingly, Judge Churchill's judgment entered on the jury's verdict is hereby affirmed.

APPENDIX C

DENIAL OF REHEARING

No. 78-5152
(United States Court of Appeals
For the Sixth Circuit)

(United States of America, Plaintiff-Appellee v. Anthony D. Giacalone, Defendant-Appellant)

ORDER

(Filed February 7, 1979)

Before: CELEBREZZE and MERRITT, Circuit Judges; PECK, Senior Circuit Judge.

No judge of the Court having moved for rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX D

18 U.S.C. §1621

"Whoever —

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true,

willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States."

APPENDIX E

18 U.S.C. §1623

"(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceeding before or ancillary to any court or grand jury of the United States, the defendant under oath has

knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if —

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or

information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence."

APPENDIX F

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

(Supreme Court of the United States)

No. A-745
(Anthony D. Giacalone, Petitioner v. United States)

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 7, 1979.

/s/ Potter Stewart
Associate Justice of the Supreme
Court of the United States

Dated this 16th
day of February, 1979.

Supreme Court, U. S.
FILED
MAY 30 1979
MICHAEL RODAK, JR., CLERK

No. 78-1505

In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY D. GIACALONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1505

ANTHONY D. GIACALONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 587 F. 2d 5 (Pet. App. A3-A5).

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1978. A petition for rehearing was denied on February 7, 1979. On February 16, 1979, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including April 7, 1979. The petition for a writ of certiorari was filed on April 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the "reasonable doubt" standard is applicable to the trial court's determination of the legal question of materiality in a perjury prosecution.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on three counts of making false declarations before a court or a grand jury, in violation of 18 U.S.C. 1623, and on one count of perjury, in violation of 18 U.S.C. 1621. Petitioner received a concurrent sentence of 18 months' imprisonment on each count, and was fined a total of $10,000. The court of appeals affirmed (Pet. App. A3-A5).

1. On March 27, 1975, and April 2, 1975, petitioner appeared before a grand jury investigating his parents' federal income tax liability. He there testified that he had received a total of $25,000 in cash as wedding gifts when he was married in February 1970 and that he had invested the entire sum in a family business. He further acknowledged that the $25,000 represented "the sum total of the wedding gifts" (Tr. 31-45, 94-100, 105-106, 114).

On April 2, 5, and 6, 1976, in the United States District Court for the Eastern District of Michigan, petitioner appeared as a witness in his father's trial for tax evasion. The government alleged that petitioner's father, Anthony J. Giacalone, had failed to report almost $90,000 in taxable income for the years 1968 through 1971. To prove its case, the government introduced in evidence a summary showing an

unexplained increase in the senior Giacalone's net worth for those years. Petitioner testified on behalf of his father, stating that he had received $104,000 in wedding gifts, and not $25,000 as he had previously testified. The $79,000 difference between petitioner's trial testimony and his grand jury statements arguably accounted for most of the money that the government charged his father with having failed to report. Petitioner further testified that he used approximately $39,000 of the $104,000 to invest in the family business, to pay wedding expenses, and to buy his wife a new car. Petitioner then stated that his father had given him the remaining $65,000 in cash and that he (petitioner) took it to Florida on his honeymoon (Tr. 120-131). The inconsistencies between petitioner's trial and grand jury testimony regarding the amount and disposition of his wedding gifts formed the basis of the three false statement counts.

Petitioner also testified at his father's trial that on October 28, 1969, his father had given him $8,324, before leaving for work (Tr. 132-135). However, at petitioner's trial, the government introduced evidence that petitioner's father was in the hospital on that day (Tr. 269, 278-279). The perjury count was predicated on this testimony.

2. At the close of evidence at petitioner's trial, the district court ruled that petitioner's statements in the grand jury and court proceedings involving his father were material as a matter of law. The court noted that the elder Giacalone's defense had been based, in part, on petitioner's testimony. The court declined to indicate whether it had found petitioner's statements

material beyond a reasonable doubt, stating that such a factual standard was inappropriate to the determination of a question of law. Thereafter the court instructed the jury that petitioner's statements were material as a matter of law (Tr. 224-229, 468, 695-697, 716, 721).

ARGUMENT

Petitioner contends (Pet. 8-13) that the Due Process Clause requires that the trial court find that his false statements were material beyond a reasonable doubt. However, as the court of appeals correctly concluded (Pet. App. A5), the reasonable doubt standard, which is applicable to factual questions in a criminal trial, is inapposite to the determination of the legal question of materiality. No court of appeals has reached a contrary conclusion, and further review of this case by the Court is unwarranted.

It is well-established that the determination of materiality in a perjury prosecution is a question of law for the court. *E.g., Sinclair* v. *United States,* 279 U.S. 263, 298-299 (1929); *United States* v. *Damato,* 554 F. 2d 1371, 1373 (5th Cir. 1977); *United States* v. *Percell,* 526 F. 2d 189 (9th Cir. 1975). The resolution of that legal issue, like the determination of the relevancy of evidence offered at trial, involves the analysis of generally undisputed facts in light of existing authorities, and does "not depend upon the probative value of evidence." *Sinclair* v. *United States,*

supra, 279 U.S. at 298.[1] Accordingly, the "reasonable doubt" standard, which reflects the degree of certainty that the factfinder in a criminal trial must entertain in resolving conflicting accounts of past events, has no bearing upon the question of materiality.[2]

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[1]Petitioner does not dispute that he made the statements in question during his testimony before the grand jury and at his father's trial. Thus, this case does not present the question whether a trier of fact would have to apply a "reasonable doubt" or "preponderance of the evidence" standard in circumstances where the issue of materiality turned on disputed facts.

[2]Petitioner erroneously relies upon *United States* v. *Lasater,* 403 F. Supp. 208 (W.D. Mo. 1975), aff'd, 535 F. 2d 1041 (8th Cir. 1976), since there the district court specifically declined to apply a particular standard in resolving materiality. See 403 F. Supp. at 217. In *United States* v. *Stassi,* 443 F. Supp. 661, 666 (D. N.J. 1977), aff'd, 583 F. 2d 122 (3d Cir. 1978), the court did state in dictum that "the government still retains the burden of proving knowledge, falsity and materiality of the statement or statements in question beyond a reasonable doubt." We note that neither of the authorities cited by the district court for this proposition supports its conclusion with regard to materiality. Both *United States* v. *Slawik,* 548 F. 2d 75, 87 (3d Cir. 1977), and the legislative history accompanying Title IV of the Organized Crime Control Act of 1970 (codified at 18 U.S.C. 1623), state only that materiality is an element of the crime of perjury. See H.R. Rep. No. 1549, 91st Cong., 2d Sess. 9 (1970). Moreover, Section 1623(e) makes clear that Congress in deleting the two-witness requirement for false statement prosecutions did not intend that the government meet a higher burden of proof than that applicable to ordinary criminal prosecutions. See H.R. Rep. No. 1549, *supra.* Nothing in the legislative history or language of Section 1623(e) suggests that the reasonable doubt standard applies to the legal question of materiality.

In any event, petitioner's sworn statements about his cash wedding gifts were unquestionably material to both his father's trial and the grand jury investigation. Petitioner's testimony concerned cash funds that petitioner initially disclaimed but later asserted were his own. If petitioner had actually received $104,000 in wedding gifts, such sums could account for his father's otherwise unexplained increase in net worth, and the expert witness for the defense so argued at the elder Giacalone's tax evasion trial (Tr. 224-229). Petitioner's testimony at his father's trial was therefore of critical importance to the jury's determination of whether petitioner's father had failed to report his income. Similarly, petitioner's testimony before the grand jury was clearly material to their decision to indict petitioner's father. See *United States* v. *Abrams*, 568 F. 2d 411, 420-421 (5th Cir.), cert. denied, 437 U.S. 903 (1978); *United States* v. *Beitling*, 545 F. 2d 1106, 1109 (8th Cir. 1976), cert. denied, 430 U.S. 918 (1977); *United States* v. *Stone*, 429 F. 2d 138 (2d Cir. 1970). In short, although we believe that factual standards are not pertinent to the determination of the legal question of materiality, petitioner's statements were material "beyond a reasonable doubt."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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